No. 10287.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNDERWRITING MEMBERS OF LLOYD'S IN LLOYD'S POLICY NUMBER 52342, and STANLEY GRAHAM BEER, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342,

Appellants,

vs.

CALIFORNIA FRUIT GROWERS EXCHANGE, a corporation, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellees.

OPENING BRIEF OF APPELLANTS.

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Come now the appellants, and respectfully submit herewith their opening brief.

Statement of Pleadings, Facts and Statutory Provisions Showing Jurisdiction of the District Court and the Circuit Court of Appeals.

This is an action instituted by the plaintiff and appellee, California Fruit Growers Exchange (hereinafter for brevity called "Fruit Growers"), upon a complaint [Tr. pp. 2 to 65, incl.], seeking a recovery of $25,000.00 from

defendant and appellee, United States Fidelity and Guaranty Company (hereinafter for brevity called "U. S. F. & G."), or defendants and appellants, Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 (hereinafter for brevity called "Lloyd's").

The complaint alleges [Tr. pp. 2, 3 and 4], that Fruit Growers was and now is a non-profit co-operative agricultural marketing corporation, organized and existing under the co-operative marketing laws of the State of California, with its principal place of business in Los Angeles, Los Angeles County, California, and that it is a citizen of that state; that U. S. F. & G. was and is a corporation organized and existing under the laws of the State of Maryland, and a citizen of that state; that all the defendant Underwriting Members of Lloyd's are non-residents of the State of California, and are residents of England and citizens of Great Britain; that Stanley Graham Beer is a resident of England and a citizen of Great Britain; that the matter at suit, exclusive of interest and costs, exceeds the sum of $3000.00, and is the sum of $25,000.00.

The answer of Lloyd's [Tr. p. 82], and the answer of U. S. F. & G. [Tr. p. 69], each admit all these allegations.

The jurisdiction of the District Court was not an issue in the case.

All the facts in the case were stipulated to. No additional evidence was introduced.

The action was one at common law for the recovery of $25,000.00 under written contracts, to-wit, fidelity bonds, executed by U. S. F. & G. and Lloyd's to Fruit Growers. [Tr. pp. 4 to 68, incl.]

The statutory provisions which sustain the jurisdiction of the District Court are as follows:

28 U. S. C. A. 41 provides that the District Court shall have original jurisdiction as follows:

> "First: Of all suits of a civil nature at common law or in equity, brought by the United States, * * * or where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000.00, and (a) arises under the Constitution or laws of the United States, * * * or (b) is between citizens of different states, or (c) is between citizens of a State and foreign States, citizens or subjects."

The statutory provisions which sustain jurisdiction of the Circuit Court of Appeals to review the judgment in question, are found in 28 U. S. C. A. 225, and read as follows:

> "(a) Review of decisions. The Circuit Courts of Appeal shall have appellate jurisdiction to review, by appeal or writ of error, final decisions—First. In the district courts, in all cases save where a direct review of the decisions may be had in the Supreme Court under Section 345 of this title."

The instant case does not fall within the provision authorizing or requiring an appeal to the Supreme Court under 28 U. S. C. A. 345.

Statement of the Facts and the Case.

There is no conflict involved in this action. Every fact not admitted by the pleadings, was stipulated by the parties in writing.

The stipulations appear in the transcript, at pages 128, 134 and 186, the supplemental stipulation providing as follows:

> "12. This supplemental stipulation as to certain facts together with the prior stipulations as to certain facts referred to in paragraph 2 hereof, constitute a stipulation as to all the facts at issue under the pleadings, and no evidence shall be introduced at the trial."

From May 1, 1937, to a date subsequent to November 1, 1937, one Floyd E. Jones was employed by Fruit Growers as a loose fruit salesman, and was scheduled as such under the Primary Bond hereinafter referred to.

From May 1, 1937, to November 1, 1937, Fruit Growers lost, through the dishonesty and defalcations of the said Jones (all of which acts came within the provisions of the Primary Bond), the sum of $23,019.22. The liability of the surety on the Primary Bond was limited to $1000.00, which was paid, leaving a balance of $22,019.22 unpaid.

Excess Bonds had been executed by both Lloyd's and U. S. F. & G., with limits of $25,000.00 each, in excess of the $1000.00 above mentioned. These bonds are hereafter referred to and discussed at length.

It was stipulated that the acts of Jones came within the provisions of these Excess Bonds, and that the amount of the loss was correct, leaving open for determination

the sole question of whether Lloyd's or U. S. F. & G. was liable for such excess of $22,019.22 under the provisions of their respective bonds and the riders attached thereto.

The District Court determined that Lloyd's was liable therefor, and gave judgment against it for $22,019.22, but provided in said judgment as follows:

> "It is Further Ordered, Adjudged and Decreed that plaintiff take nothing by reason of this action against defendant United States Fidelity and Guaranty Company, a corporation; provided, however, that in the event defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, or any of them, shall appeal from this judgment and if it shall be finally determined that plaintiff is not entitled to recover from defendants Underwriting Members of Lloyd's in Lloyd's Policy Number 52342 and Stanley Graham Beer, individually and as representative of the Underwriting Members of Lloyd's in Lloyd's Policy Number 52342, or any of them, then plaintiff shall have and recover from defendant United States Fidelity and Guaranty Company, a corporation, the sum of $22,019.22, together with interest thereon from the date of this judgment at the rate of seven per cent per annum, and together with plaintiff's costs herein incurred."

It was further stipulated that the loss involved herein was discovered by plaintiff on July 31, 1940. [Tr. pp. 189 to 190.]

On October 23, 1912, U. S. F. & G. executed and delivered to Fruit Growers its Primary Fidelity Bond, guar-

anteeing to pay to it any pecuniary loss occasioned by acts of fraud, dishonesty, etc., of certain listed employees of Fruit Growers. This bond since that date has at all times continued to remain in full force and effect. It is set out in full in the transcript, at pages 13 to 25.

The limit of liability under said bond, as to the employee here involved, was $1000.00. This bond at no time contained a "Discovery Clause"; that is, a provision limiting the time within which the loss must be discovered by the obligee in order to recover under the bond from U. S. F. & G. for the defalcation.

On November 1, 1936, Lloyd's, through their agents, Swett & Crawford, issued to Fruit Growers a "Certificate of Insurance", which certified that Fruit Growers had procured insurance as therein set out, to-wit, the insurance covered by an Excess Blanket Fidelity Bond, on the terms and conditions mentioned in said certificate, and that said certificate should furnish evidence of the procuration thereof. [Tr. pp. 26 to 33.]

The bond, of which this was evidence, gave coverage up to $25,000.00 in excess of the limits of the Primary Bond, where liability existed on such Primary Bond, subject to the terms and conditions therein contained. This certificate (sometimes called a binder), was issued so that the assured might have evidence of its excess coverage until the formal bond, which was to be issued in London, England, should arrive, at which time the bond would supersede it. [Tr. p. 29.]

This bond was effective from November 1, 1936, to November 1, 1937.

As of November 1, 1936, the formal bond was issued by Lloyd's, and at some date delivered to Fruit Growers. It appears in full in the transcript, at pages 34 to 44.

The bond contained the same provisions as the certificate.

As of November 1, 1937, U. S. F. & G. executed and delivered its Excess Commercial Blanket Bond to Fruit Growers, with limits of $25,000.00 over the Primary Bond of $1000.00, covering the defalcations of Fruit Growers' employees. This bond appears in the transcript, at pages 45 to 64.

This bond was in effect from November 1, 1937, to November 1, 1938, and is hereafter called "U. S. F. & G.'s 1937 Excess Bond".

As of November 1, 1938 [Tr. p. 93], U. S. F. & G. executed and delivered to Fruit Growers its Excess Commercial Blanket Bond, with limits of $25,000.00 over the Primary Bond of $1000.00, covering the defalcations of Fruit Growers' employees. This bond appears in the transcript, at pages 91 to 121. It was substantially the same as the U. S. F. & G.'s 1937 Excess Bond, except as to its effective date, and it is hereafter called "U. S. F. & G's 1938 Excess Bond".

The Controversy, and How It Arose.

There was and is no controversy over the right of Fruit Growers to recover the full sum of $22,019.22. The only controversy which arose or which now exists is, whether U. S. F. & G. is liable therefor, or whether that liability falls upon Lloyd's. This controversy arises in the following manner:

On January 28, 1938, there was executed, attached to and made a part of U. S. F. & G.'s 1937 Excess Bond a rider [Tr. pp. 62 to 64], sometimes called in the insurance profession a "Superseded Suretyship Rider", or a "Continuity Rider", and since it is of vital importance we print it herewith in full, as follows:

"United States Fidelity and Guaranty Company
Baltimore, Maryland

RIDER

No. 02-308-37 $.....

To be attached to and form a part of Excess Commercial Blanket Bond, (Standard Form AA) No. 14815-02-308-37, issued by the United States Fidelity and Guaranty Company, of Baltimore, Md., in the amount of Twenty-five Thousand Dollars ($25,000.00), in favor of California Fruit Growers Exchange, *et al* (hereinafter called Employer), and dated the 1st day of November, 1937.

Whereas, Lloyds issued an Excess Blanket Fidelity Bond (hereinafter called the prior bond), effective the First day of November, 1936, in the amount of Twenty-Five Thousand Dollars ($25,000.00), and in favor of the Employer; and

Whereas, the prior bond, as of the effective date of the attached bond, has been terminated or cancelled by notice or agreement, as is evidenced by the issuance and acceptance of the attached bond and this rider;

Now, Therefore, it is hereby understood and agreed as follows:

1. That the attached bond shall be construed to cover, subject to its terms, conditions and limitations,

any loss or losses under the prior bond which shall be discovered after the expiration of the time limited therein for the discovery of loss thereunder, and before the expiration of the time limited in the attached bond for the discovery of loss thereunder; provided that such loss or losses would have been recoverable under the prior bond had it not been cancelled or terminated; and provided further, that the acts or defaults causing such loss or losses be such as are covered under the attached bond on its effective date.

2. That nothing in the attached bond or this rider contained shall be construed as increasing the time for discovery of any loss or losses under the prior bond beyond what would have been the time for such discovery had the prior bond not been cancelled or terminated.

3. That liability under the attached bond as extended by this rider on account of loss or losses under the prior bond shall not exceed the amount of the attached bond on its effective date less all deductions on account of all payments made under the attached bond and the attached bond as extended by this rider, or the amount which would have been recoverable under the prior bond on account of such loss or losses had the prior bond not been cancelled or terminated, if the latter amount be the smaller.

4. That any sum or sums which shall be paid under the attached bond as extended by this rider on account of any loss or losses under the prior bond shall reduce or be deducted from the amount of the attached bond in the same manner and subject to the same conditions and limitations as payments under the attached bond, but any sum so reducing or de-

ducted from the amount of the attached bond shall be restored thereto as therein provided.

Signed, sealed and dated this 12th day of January, 1938.

United States Fidelity and
Guaranty Company
J. St. Paul White
Attorney-in-fact

Accepted:

California Fruit Growers
Exchange
By (Illegible)
Asst. Secretary.

(Endorsed): Filed Mar. 12, 1941."

[Tr. pp. 62 to 64.]

This rider, being a part of U. S. F. & G.'s 1937 Excess Bond, was effective until November 1, 1938, at which time the bond itself terminated or was cancelled.

The U. S. F. & G.'s 1938 Excess Bond contained an exactly similar rider [Tr. p. 112], except that in the premise it recites the execution and termination or cancellation of the U. S. F. & G.'s 1937 Excess Bond, whereas the rider attached to the U. S. F. & G.'s 1937 Excess Bond recites the execution and termination or cancellation of Lloyd's Excess Bond.

From these riders it will be seen that U. S. F. & G. was to be liable for losses occurring during the *currency* of the Lloyd's Excess Bond, but which were not *discovered* within the time limited for the discovery thereof by the provisions of the Lloyd's Bond.

These riders gave the assured continuous coverage, regardless of the date of discovery, from which comes the term "Continuity Rider", or "Superseded Suretyship Rider".

Lloyd's contended that U. S. F. & G. was liable for the loss, by reason of these riders, and the fact that under the provisions of Lloyd's Bond liability ceased simultaneously with the termination of its Excess Bond, for all losses not *discovered* prior to that time, since the Primary Bond contained no Discovery Clause.

U. S. F. & G. contended that since the Primary Bond contained no Discovery Clause, Lloyd's was liable for all losses occurring during its currency, and discovered at any time prior to the expiration of three years after the expiration and non-renewal of Lloyd's Bond.

The correctness of the respective contentions depends, in addition to the matters already stated, upon the proper construction of the clause contained in both the Lloyd's Certificate of Insurance [Tr. p. 29], and the Bond [Tr. p. 38], which provided as follows:

> "5. Warranted Free of All Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency, with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this insurance."

Specifications of Error.

In legal strictness there is but one error complained of herein. This error may be stated in two ways, or in either one of two ways, as follows:

I.

The decision and judgment against Lloyd's are against law.

II.

The evidence is insufficient to sustain the decision and judgment as against Lloyd's.

As incidents of these fundamental propositions, the errors of the Court consist of the following:

III.

The trial court erred in construing the bonds of U. S. F. & G. and Lloyd's, so as to render execution and issuance of U. S. F. & G.'s Superseded Suretyship Rider ineffectual, meaningless and useless.

IV.

The trial court erred in not applying to said documents the rule of contemporaneous construction, in view of the construction placed thereon by all the parties to this action.

V.

The trial court erred in not applying to Lloyd's policy the rule that the parties are presumed to have been familiar with the rules of grammar, and used apt and well-chosen words to express themselves.

VI.

The trial court erred in interpreting Lloyd's contract so as to render ineffectual a portion of the language expressed therein.

VII.

The trial court erred in, in effect, reading into Lloyd's contract language which was not contained therein, when the terms of the contract were clear and explicit.

ARGUMENT.

I.

It Is a Cardinal Rule of Construction, That Where Two Constructions Can Be Placed Upon Documents, One of Which Will Render the Instrument Valid and Effectual, and the Other Render It Void, Useless and Meaningless, the Former Construction Will Be Adopted and the Latter Rejected. To Hold Lloyd's Liable for the Loss in the Instant Case, Would Be to Hold That U. S. F. & G. Executed, for a Consideration, a Useless Paper, and Its Acts in So Doing Were Useless and Meaningless.

In order to follow the argument, we believe it will be helpful to the Court to restate as tersely as clarity will permit, a few pertinent dates and the subjects to which they relate. They are as follows:

(1) October 23, 1912, U. S. F. & G. issued its Primary Bond;

(2) November 1, 1936, Lloyd's issued its Certificate of Excess Insurance;

(3) As of November 1, 1936, Lloyd's issued its Policy of Excess Insurance;

(4) November 1, 1937, Lloyd's Excess Policy expired by its own terms, it having never been renewed;

(5) November 1, 1937, U. S. F. & G. issued its 1937 Excess Bond;

(6) January 28, 1938, U. S. F. & G. executed and attached to the 1937 Bond its Superseded Suretyship Rider;

(7) November 1, 1938, U. S. F. & G. issued its 1938 Excess Bond with Superseded Suretyship Rider attached;

(8) The loss *occurred* between May 1, 1937, and November 1, 1937;

(9) The loss was *discovered* on July 31, 1940.

From the foregoing it will be seen that the loss occurred during the time Lloyd's policy was in force, but was not discovered until two years and eight months thereafter.

Let us first take up the consideration of the U. S. F. & G.'s Superseded Suretyship Rider and examine it in the light of all the facts in the case.

What was the purpose of the execution of this rider? In determining this question it should be borne in mind that the bond to which it was attached as a rider, was effectual only from November 1, 1937, to November 1, 1938.

Being an instrument in writing, a consideration therefor is presumed.

Next, we must bear in mind that U. S. F. & G. was familiar with the terms and conditions of Lloyd's Bond. No doubt can exist upon this subject, since it was stipulated between the parties that such must be legally inferred, the stipulation in this particular reading as follows, to-wit [Tr. p. 191]:

> "8. It is stipulated that it is to be legally inferred that at the time Lloyd's issued its excess policy Lloyd's was familiar with the terms and conditions of the primary bond, *and similarly it is stipulated that it is to be legally inferred that at the time defendant*

United States Fidelity and Guaranty Company issued its 1937 and 1938 bonds and superseded suretyship riders attached thereto it was familiar with the terms and conditions of Lloyd's excess policy and the primary bond."

Appellee, U. S. F. & G., contended, and we assume they will here contend, as the Court decided,—that the period for discovery of losses under the Lloyd's Bond was three years after its termination, by reason of the fact that the primary bond contained no Discovery Clause.

Is this a reasonable construction, or legally sound under the facts in this case?

We submit that it is not.

This is best answered by asking ourselves the question: What possible purpose could be served by the execution of such a rider, if in fact it could never be effectual? That is to say, if Lloyd's was already liable for any losses occurring during its currency, and which were discovered within three years thereafter, what would be the use of adding a rider to the U. S. F. & G. Bond for a period of one year (during said three-year period), which provided that U. S. F. & G. would be liable for such losses occurring during the term of Lloyd's Bond, only if they were not discovered within the time limited therein for the discovery thereof?

Let us revert, for the moment, to certain rules of contractual construction.

Where two or more constructions can be placed upon an instrument, and the acts of the parties, one of which

will result in rendering effectual the document or act, and the other of which will render such document or act useless and ineffectual, the Court will construe the instruments or acts in such way as to render them effectual and useful, and disregard the construction which will render them useless or ineffectual.

This of course is a familiar rule of construction, and has been stated in varying ways.

In C. C. 1643 it is stated as follows:

> "Interpretation in Favor of Contract. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."

In *Robbins v. Pacific Eastern Corp.*, 8 Cal. (2d) 241, 273 (65 Pac. (2d) 42), it is said:

> "The California courts have applied this rule of construction to a variety of situations. Supported by many authorities, the rule is stated as follows in 6 California Jurisprudence, page 268, section 168: 'As between two permissible constructions, that which establishes a valid contract is preferred to that which does not, since it is reasonable to suppose that the parties meant something by their agreement, and were not engaged in an attempt to do a vain and meaningless thing.' "

In *Rabbitt v. Union Indemnity Co.*, 140 Cal. App. 575, 585 (35 Pac. (2d) 42), the Court, in construing a contract of indemnity, said:

> "Several contracts relating to the same matters, between the same parties, and made parts of sub-

> stantially one transaction, are to be taken together, and the contract in question must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."

Innumerable other decisions could be cited, setting forth this rule of construction in its various forms, but we believe the above will be sufficient.

Now, if the construction contended for by U. S. F. & G. is correct, then it must necessarily follow that that company, nearly three months after it had executed its original bond, added a rider which the obligee accepted, and the acts of issuing and accepting the same were performed for no purpose whatsoever and they therefore performed a completely idle act. Not only this, but in order to reach that conclusion the Court must say that U. S. F. & G. charged Fruit Growers a consideration for the purpose of attaching to an existent bond a useless piece of paper,—that is, one which under no circumstances could possibly be effectual or of value.

Such a construction leads to an absurdity, and is wholly inconsistent with the rules of construction heretofore mentioned.

On the other hand, if the construction contended for by Lloyd's be correct, then the document becomes valid, effectual and purposeful.

Thus we submit that it would be the duty of the Court to reject the construction which would render it worthless and meaningless, and adopt the one contended for by Lloyd's.

II.

All of the Parties to This Action Placed a Contemporaneous and Practical Construction Upon the Bonds in Question, Exactly as Contended for Herein.

If Doubt Exists, Then the Contemporaneous Construction of the Parties Furnishes a Guiding Light to Determine the Proper Construction to Be Placed Upon the Documents Involved.

Let us now refer to another rule of construction.

This rule has also been stated in varying language, but its principle is uniformly recognized by all the courts. In substance it is, that the contemporaneous construction of the parties, to a written instrument, is of great value, and is often controlling in the interpretation of written instruments.

In *Moore v. Superior Court,* 114 Cal. App. 333, 336 (299 Pac. 760), it is stated as follows:

> "The rule of law is well known that where a party to an agreement has placed a certain construction upon it his conduct in that regard will be most persuasive upon the courts to regard the instrument in a similar light."

In *Lemm v. Stillwater Land & Cattle Co.,* 217 Cal. 474, 481 (19 Pac. (2d) 785), the Court said:

> "In viewing the surrounding circumstances and the situation of the parties the court may also call to its aid the events subsequent to the execution of the contract, particularly the practical construction given to the contract by the parties themselves, as shedding light upon the question of their mutual intention at the time of contracting. (6 R. C. L., p. 853.)"

In *McCartney v. Campbell,* 216 Cal. 715, 719 (6 Pac. (2d) 729), the Court said:

> "It is well settled that the acts of the parties subsequent to the execution of a contract may be looked to in ascertaining its meaning, since they are in effect a *practical construction* thereof. (Citing cases.)"

Appellants submit that the above rule of construction applies very forcibly here.

The action of both Fruit Growers and U. S. F. & G., in having issued, attached to and made a part of U. S. F. & G.'s Excess Bond the Superseded Suretyship Rider above set out, must be construed as a construction on their part to the effect that since the Primary Bond contained no Discovery Clause, liability under the Lloyd's Excess Bond for losses not discovered prior to its expiry date, ceased simultaneously with the expiration of the bond, and in view of that fact, in order to provide continuous coverage, the Continuity or Superseded Suretyship Rider was executed. In other words, both U. S. F. & G. and Fruit Growers understood and construed the language of Lloyd's Bond exactly as Lloyd's understood it and intended it to be understood. We submit that the language of the bond is capable only of the construction and interpretation so placed upon it by all of the parties to this action, when carefully examined in the light of familiar principles of construction and interpretation.

If what we have said is not true, let U. S. F. & G. in its brief satisfactorily explain the purposes of such rider and its acts in connection therewith.

III.

The Language of the Contract Must Govern Its Interpretation. It Must Be Presumed That the Parties Were Familiar With the Rules of Grammar, and That They Used Apt and Well-Chosen Words to Express Themselves.

When Lloyd's Bond Is Examined and This Rule Applied, It Is Clear, Definite and Explicit, and Leaves No Room for Interpretation. To Imply Something Contrary to That Expressed, Is, in Effect, to Rewrite the Contract for the Parties. This Is Without the Legitimate Bounds of Judicial Propriety.

We are next brought to a consideration of the provisions of the above quoted clause in Lloyd's Bond.

First let us consider certain rules of construction which may be applicable.

C. C. 1638 provides:

> "The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity."

C. C. 1644 provides:

> "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

C. C. 1645 provides:

> "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

C. C. P. 1858 provides:

> "In the construction of a Statute or instrument the office of a Judge is simply to ascertain and declare what is in terms or substance contained thereon,—not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

In *Loyalton, etc. v. California, etc., Co.,* 22 Cal. App. 75, at 77 (133 Pac. 323), the Court says:

> "Where parties have written engagements which industriously express the obligations which each is to assume, the Courts should be reluctant to enlarge them by implication as to important matters. The presumption is, that having expressed some, they have expressed all, of the conditions by which they intend to be bound. (Citing cases.)"

With these rules in mind, and the general rule so well established as to require the citation of no authority, to the effect that the parties are presumed to know and understand the rules of grammar and the use of language, and that they have expressed their will in apt and well-chosen terms (Black on Interpretation of Laws, 2nd Ed., p. 148), let us carefully examine the provisions of the clause in question.

The words "Policy", "Assured", "Discovery Clause", and "Primary Policy" are all capitalized. Why? Because they are proper nouns.

Foerster and Steadman's "Sentences and Thinking" says of capital letters:

> "The two fundamental uses of capitals are (1) to mark a new unit of thought, and (2) to designate a word as proper and not common."

"Capitalize all proper nouns or adjectives. Names of persons or the equivalents of such names; names of races, languages, religious, political, social, legislative, educational, or military organizations; of wars, historical epochs or movements; of the days of the week, of the months, of holidays—are capitalized because they refer to specific, individual persons or things."

"It is often difficult to determine whether a given noun is proper or common. But the context will, in most cases, enable one to determine whether the reference is to a particular person or thing, or to any one of a class of persons or things."

New Standard Dictionary, under "Capital Letter", says:

"A letter larger and more conspicuous than others of the same font and of a different form, as the 'A' in 'Africa'; used to distinguish proper names, for the beginning of paragraphs or lines of poetry, and for titles and display."

Now, it will be noted that each capital letter used in the clause under examination, is properly and advisedly used.

"Policy" refers to a particuar policy.

"Assured" refers to the particular assured.

"Primary Policy" refers to the particular primary policy. Then what does "Discovery Clause" refer to?

Obviously it refers to a particular thing—that is, a Discovery Clause,—a thing which can be definitely and specifically identified and read, if it is in existence. It refers to a thing to be *expressed* in the Primary Policy,—not to something which may be *implied* or read into the Policy.

But upon examination we find no such express Discovery Clause contained therein.

What, then, is the result? To which question the answer must be, that this phrase was designed to cover the situation, *if* the Primary Policy contained a Discovery Clause. But if such Primary Policy did not contain a Discovery Clause, then the clause above mentioned would become inoperative, and we look elsewhere to determine the limitation of time within which losses must be discovered, which occurred during the currency of Lloyd's Policy.

This is simple, for the paragraph under scrutiny provides that the bond is "Warranted free for losses * * * not discovered during its currency".

Thus we submit that under the clear and explicit language of the clause under scrutiny, the time within which losses must be discovered in order to create a liability under Lloyd's Bond, was prior to the expiration of that bond.

To otherwise construe it, would be in contravention of the rules of construction so aptly expressed in C. C. P. 1858. It would be inserting something which has been omitted. It would be re-writing the contract of the parties.

This language is clear and explicit. There is no room for any interpretation. There is no room to declare, through construction, that because of the absence in the Primary Bond of any Discovery Clause, the time for discovery would be three years.

Nowhere in Lloyd's Policy is there any language which would justify such an interpretation. Nowhere have the

parties stated that if the Primary Policy contained no Discovery Clause, the time for discovery should be extended. Such a construction cannot be placed thereon, without doing violence to the very language of the contract, and holding that the execution of the U. S. F. & G. Superseded Suretyship Riders was a useless and meaningless act.

Now, it may be suggested that in view of the fact that Lloyd's was presumed to be familiar with the terms and conditions of the Primary Bond, the exception contained in the clause which we are examining must have been intended by them to have some effect. This is true, but the effect which it was to have, was to be conditioned upon the existence in the Primary Bond of a Discovery Clause. Clauses of this nature are standardized to cover every conceivable situation, and do not have to be prepared separately to fit every varying situation which might arise by virtue of the language in the Primary Bond. That this is true, can admit of no doubt, and certainly cannot be disclaimed by by U. S. F. & G., for both of U. S. F. & G.'s Excess Bonds contained similar clauses, as follows, to-wit:

> "(c) If the time limits specified in said primary fidelity suretyship for discovery of, or making claim for, loss after the expiration, termination or cancellation thereof as an entirety, or for filing notice of loss, for filing proof of loss or for bringing suit are less than the corresponding time limits in this bond, then this bond shall be subject to the time limits specified in said primary fidelity suretyship as if written herein. (d) If the time limit specified in said primary fidelity suretyship for the discovery of, or making claim for, or for filing proof of loss for, loss after the happen-

> ing of any of the events specified in Section A, paragraph 8, be greater or less than the corresponding time limit in this bond, then this bond shall be subject to the time limit specified in said primary fidelity suretyship as if written herein, provided, however, that in no event shall the time for discovery of, or making claim for, or for filing proof of loss for, any such loss be extended beyond the time within which, under the terms of this bond, losses must be discovered or claims must be made or proof of loss filed after the cancellation hereof as an entirety." [Tr. pp. 49-50, 96-97.]

Here is an instance where U. S. F. & G. has written both the Primary and the Excess Bond, and still their Excess Bond contains provisions referring to certain times *specified* in the Primary Bond, when they of course were bound to know that the Primary Bond had no period of time for discovery *specified* therein.

Thus they followed the same procedure Lloyd's followed, and used a standardized clause, which clause's effectiveness and operativeness depended upon the existence or non-existence of a specified time for discovery, either contained or not contained in the Primary Bond.

The situation is quite analogous to provisions in Constitutions which are not self-executing, but which require an enabling act to give them force and effect. Obviously, the exception does not *ex proprio vigore* enlarge the discovery period. That period would be enlarged only in case the Primary Bond provided a discovery period.

Provided how? By construction? No. By general terms of the Primary Bond? No. By limitation of three years? No. By statute of limitations? No. It would have to be

provided or "furnished" by an *express* Discovery Clause contained in the Primary Bond, and since none exists, then the provisions of the exception never became operative or effectual.

It may be argued by appellees that to require the Assured to discover his losses during the currency of the Lloyd's Bond, would work a hardship on the Assured, if the loss occurred near the period of its termination, and therefore that the Court should not construe the language of the bond in accordance with our contentions.

To this there are a number of answers.

In the first place, the parties in the instant case contracted at arm's length. There was no confidential or fiduciary relationship existing between them, and where parties freely so contract, in the absence of fraud, duress, mistake, etc., the courts will not concern themselves with the hardships or the benefits to be derived from the contract.

Secondly, it will be observed that the Lloyd's Bond does not cover only losses occurring during its term, for the one year from November, 1936, to November, 1937, but covers all losses *occurring* subsequent to November 1, 1935 [Tr. p. 36], or in other words, for the previous year also. Thus, a loss occurring between November 1, 1935, and November 1, 1936, but discovered between November 1, 1936, and November 1, 1937, would be covered by this bond.

The reason for this is obvious. Unlike the American companies, instead of writing Superseded Suretyship Riders, continuity of coverage is obtained by the renewal of the bond, thus carrying the period back to the first

writing of such bond, but when such bond is not renewed, the period of discovery ceases with its termination, unless the Primary Bond contains a Discovery Clause, in which event the period is extended in accordance with that provided or specified in such Primary Bond.

Now, let us carry our examination further, and see if the language of the pertinent clause will stand an interpretation other than contended for by Lloyd's.

Take the phrase, "a period equal to that provided by the Discovery Clause".

"Provided", is defined in Webster's as "furnished", and it is so defined in *King v. State,* 30 Tex. Civ. App. 320 (70 S. W. 1019, 1021).

In *People v. Joyce,* 246 Ill. 124, 92 N. E. 607, it is defined as "to fix; to establish as a previous condition; to determine; to settle".

"Equal" is defined by Webster's, and in a number of decisions, as being in just proportion.

In *Fechteler v. Palm,* 133 Fed. 462, 471, it is defined as "measured or estimated by".

From this it is obvious that the exception contained in the clause under scrutiny, could have no application here, for the reason that no discovery period was *provided* or *furnished* by the Primary Bond.

Lloyd's Bond is referring to an expressed period—not to one *not* expressed therein, or to be implied. How could the period be *equal* to a period which does not exist? But suppose the Court should attempt to rewrite the contract, through the expedient of interpretation or construction, so as to make a period which would be *equal,*—or in other

words, did, by such construction, insert in the contract something which did not appear therein. What would it insert? One year? Eighteen months? Six months? Or what? The discovery in the instant case was two years and eight months after the expiration of the bond. If the Court, by interpretation or construction, were to fix a period less than two years, then still there would be no liability under the bond, since the discovery would not have been made within that time.

This, we submit, demonstrates the fallacy of attempting, through construction, to rewrite the contract. The clause does *not* say that the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bond, *and if the Primary Bond has no Discovery Clause, then a period not exceeding three years,* but if the Court should so interpret it, it would be the same as though the Court had inserted the above italicized portion, which would be contrary to the fundamental and basic rules of construction and interpretation.

Finally, in order to avoid confusion or misapprehension, we desire to mention one additional matter.

Since the Primary Bond contained no Discovery Clause the impression might arise that the period for discovery was the same as the Statute of Limitations, to-wit, four years, or that reference to the Discovery Clause was in effect a reference to the Statute of Limitations.

Such of course is not the case. The Statute of Limitations is separate and distinct from provisions relative to Discovery Clauses. The fact that a Discovery Clause may limit the Assured's right to recover under the bond, has nothing to do with his right to bring an action there-

under. If the discovery has been made within the time provided by the bond, then unless limited by contract, the right to bring an action is governed by the Statute of Limitations, and vice versa, if there has been a failure to discover within the time prescribed by a Discovery Clause, then the fact that the Assured may have ample time within the provisions of the Statute of Limitations, within which to file his suit, does not in itself create a liability under the bond. This, we think, is obvious, but out of an abundance of precaution we cite to your Honorable Court a decision wherein the very question has been raised and decided.

In *Ballard v. U. S. Fidelity and Guaranty Co.,* 150 Ky. 236 (150 S. W. 1), the Court had this matter squarely presented to it, and there said:

> "The bond does not attempt to fix the period in which suit shall be brought. It simply provides for liability for losses occurring and discovered within a certain specified time. If the losses are of the character contemplated by the bond, and occur and are discovered within the time fixed by the bond, then the obligee in the bond may bring his action whenever he pleases, within the limits fixed by the sections, *supra.* It follows, therefore, that the bond in no sense fixes a period of limitation different from that prescribed by the Statute."

To the same effect see:

City Bank v. Bankers' Limited Mut. Casualty Co., 238 N. W. 819;

Webster v. U. S. Fidelity and Guaranty Co., 169 Miss. 472 (153 So. 159).

IV.

Every Contract Should Be Interpreted So as to Give Effect to Every Word, Phrase, Sentence and Clause.

To Interpret Lloyd's Policy as Extending the Time for the Recovery of Losses Beyond Its Expiry Date, Even Though It Was Not Renewed, Would Render Ineffectual and Meaningless a Portion of the Clause Under Scrutiny.

Some bonds contain no Discovery Clause. Some require discovery during the currency of the bond. Others have periods of three months, six months, one year, etc.

Innumerable cases involving Discovery Clauses have been the subject of decisions by the courts, and such clauses have been uniformly upheld. The following are a few examples:

City Bank v. Bankers' Limited Mut. Cas. Co. (1931), 238 N. W. 819;

Thompson v. American Surety Co. (1930), C. C. A. 8th, 42 Fed. (2d) 953;

Ballard v. U. S. Fidelity and Guaranty Co., 150 Ky. 236, 150 S. W. 1;

Chicora Bank v. U. S. Fidelity and Guaranty Co. (1931), 161 S. C. 33, 159 S. E. 454;

Miners & Merchants Bank v. U. S. F. & G. Co., 233 Fed. 654;

Florida Cent. & P. R. R. Co. v. American Surety Co., 99 Fed. 674.

In the development of the history of surety bonds, the earlier bonds contained no Discovery Clause, while in

later years Discovery Clauses began to appear more frequently, and while they appear in most instances in bonds written as of the present time, the rule is not universal.

As has been indicated, Lloyd's and other large insurance carriers endeavor, through a uniform clause, to protect themselves in relation to Discovery Clauses contained in Primary Bonds, so that their standard clause will be applicable in each instance, whether there is or is not a Discovery Clause contained in the Primary Bond, thus eliminating the necessity of writing a new and separate clause in each instance. Thus the clause contained in Lloyd's Bond in the instant case was designed to be applicable under all circumstances, so that if no Discovery Clause was contained in the Primary Bond, then the right of discovery would cease upon the expiration of the time the bond itself ceased to be effective, and if the Primary Bond did contain a Discovery Clause, then the right of discovery would be co-extensive with it; provided, however, such period of discovery should not exceed three years.

From the foregoing decisions we have already seen that every part of a clause should be given effect, if it can be done without doing violence to the intention of the parties.

This fundamental rule is well stated in 23 *Cal. Jur.* 758, Sec. 133, and supporting cases, as follows:

> "Every Part to Be Given Effect. It is fundamental that, if possible, a statute or code section should be construed so as to give meaning and effect, not only to the statute or code section as a whole, but to each and every part thereof,—*i. e.,* to every word and clause, and certainly to every distinct or co-ordinate

> provision or section. Such meaning must be given, if possible, as will permit the whole statute to stand, and leave no part useless, or deprived of all sense and meaning, even to sustain the validity of the act. Words should never be considered unnecessary and surplusage, if a reasonable construction can be adopted which will give force to and preserve all the terms of the statute. Any construction should be avoided which implies that the legislature was ignorant of the meaning of the language as employed, or that it used words in vain, the legal intendment being that each and every word or clause was inserted for some useful and sensible purpose, and that, when rightly understood, it may have some practical operation. If certain provisions are repugnant, effect should be given to those which best comport with the end to be accomplished and render the Statute effective, rather than nugatory."

With this rule in mind, let us now further examine Lloyd's Excess Bond.

We shall hereafter refer to the following portion thereof, to-wit:

> "Warranted free of all claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency,"

as the "main clause", and the remaining portion of the clause, to-wit:

> "with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bonds (but not exceeding three years) in which to discover losses claimable under this Insurance."

shall hereafter be referred to as the "exception to the main clause".

Referring to the main clause separately, it will be observed that it is all-inclusive; that is, that there could be no claim under this policy, where the loss was not discovered during the time the policy was in effect. This means—

(1) If the policy was renewed;

(2) If the policy was not renewed.

The exception, which starts with the phrase "with the understanding", is the same as though it said "except", or "provided, however", or used similar terms.

In accordance with common sense and the rules of construction above mentioned, it is necessary for us to give full force and effect, if it reasonably can be done, to each phrase, sentence, word, etc., of this paragraph. Can this be done under the construction contended for by U. S. F. & G.? If not, then their position must be unsound, and the one contended for by appellants should be adopted.

Obviously, if the Policy were renewed, then Subdivision (1) of the Main Clause would become operative, and the balance of the Main Clause and the Exception to the Main Clause would be inoperative, since the Clause is drawn in the alternative, but as we have seen, the Policy was not renewed in the instant case, and it next becomes incumbent upon us to examine Subdivision (2) of the Main Clause and the Exception to the Main Clause, and in so examining and construing them we must bear in mind that they should be construed so as to give effect to both Subdvision (2) of the Main Clause and the Exception thereto.

Now, the Exception to the Main Clause stated that in the event of non-renewal the Assured should have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bond.

Had the parties intended that the Main Clause should apply only when there was a renewal of the bond, they undoubtedly would have said so.

The Exception to the Main Clause is, in itself, complete, and had the Primary Bond contained a Discovery Clause this Exception would be effectual and operative. Thus a purpose is supplied for that phrase, and therefore if the bond did contain a Discovery Clause it would leave ineffectual Subdivision (2) of the Main Clause.

Now, if we say that since there was no Discovery Clause, the bond being not renewed, there still remains a right to discover up to a limit of three years,—what possible effect can be given to Subdivision (2)? What purpose can be attributed to the parties to the contract, in using language of this nature? If the lower court's decision is correct, no possible purpose can be attributed to it. It is useless, ineffectual, and surplusage.

On the other hand, if we follow the rules of construction above set out, which rules, we submit, are consonant with sound reason and logic, we will give effect to the language of the Main Clause and particularly to Subdivision (2) of the Main Clause, for under such circumstances, there being no Discovery Clause contained within the Primary Bond, the limitation for the discovery of losses becomes fixed and determined by Subdivision (2) of that Clause.

We respectfully submit that the language of this Clause should be understood as it is written, and in effect should be interpreted as though it read, in effect:

> "Warranted Free of all Claim for losses occurring subsequent to the expiry date of this Policy and for losses not discovered during its currency, *whether this bond be renewed or not,* with the understanding that in event of non-renewal the Assured shall have a period equal to that provided by the Discovery Clause of the aforesaid Primary Bond, *if the Primary Bond contains a Discovery Clause,* (but not exceeding three years), in which to discover losses claimable under this Insurance."

Diligent search for cases exactly in point, has failed to disclose any. There are, of course, decisions where losses occurred during the currency of a particular bond, and were not discovered within the period provided for therein, where the subsequent surety has been held liable for the losses under their superseded suretyship riders. Such a case is that of *American Employers' Ins. Co. v. Roundup Coal Mining Co.,* 73 Fed. (2d) 592.

We have been fortunate in finding an early California case which we believe analogous to the situation involved herein, and although that case did not involve a surety bond, the principle announced therein is, we believe, identical with the one here under consideration. Since the National Reporter system does not cover this case, we give only the California citation. It is *Caldwell v. Center,* 30 Cal. 539.

That was an action for ejectment, and one of the links in the chain of title under which plaintiff claimed, was a deed from Stevens and Abell to Lyons and Sturtevant, of a parcel of land "known as Lot Number One in the

subdivision of the tract of land lying on the new county road and known as Foley's Tract, the map of which is duly recorded in the Recorder's Office of the County of San Francisco, reference to which is herein made."

After holding that the parties to a deed might describe the property by reference to another instrument which would completely describe it, the Court said:

> "The deed and the instrument therein referred to, when taken together, must be as certain in respect to the description of the premises, as a deed containing no direct reference to another document.
>
> * * * * * * * *
>
> The deed of Stevens and Abell to Lyons and Sturtevant is not sufficient in the description of the premises conveyed, to designate and attach itself to any particular tract of land without the aid of further evidence. Admitting that the exterior lines of the Foley Tract were as claimed by the plaintiff, evidence of some kind was requisite to show where Lot Number One was located. The only evidence introduced by the plaintiff for this purpose was a map from the Recorder's Office and a map from the Surveyor's Office, and parol testimony in explanation of the last map. The defendants objected to the map from the Recorder's Office on the grounds, among others, that 'it was made with pencil and not with ink', and that 'it is pasted in between the leaves of the book, but not recorded'.
>
> The objection should have been sustained. Had the deed referred to a map to be found in that place and condition, it would have been admissible in evidence, for it would have constituted in effect a part of the deed, as much as if it had been copied into it. (Vance v. Fore, 24 Cal. 444, and cases cited.) But the deed calls for a map duly *recorded* in the Re-

> corder's office, and by the utmost stretch of liberality the one produced cannot be regarded as recorded. * * * The map should for these reasons have been excluded. The map from the Surveyor's office did not fill the place of the one specified in the deed. * * * as the map now appears before us, it does not fill the place that the parties to the deed designed should be occupied by the map they designated as containing the metes and bounds of the tract of land conveyed. By excluding the map from the Recorder's office, which should have been done, the plaintiff's chain of title is broken."

We consider the foregoing case analogous, for the reason that therein it is obvious they designated a map as being recorded in a particular place, and the Court italicized the word "recorded". Now it appears that in that case there was a map present, but the map was not as designated in the original instrument.

In the instant case there is a reference to a Discovery Clause, and the time provided by that Discovery Clause, in the Primary Bond,—yet upon examination we find that there was no Discovery Clause contained in the Primary Bond, and as a consequence the situation is analogous to the deed in the above case, which referred to something which did not exist.

The instant case, however, is much stronger than the foregoing, for the obvious reason that there the Court had before it a document which appeared to be one to which the parties were referring, and the clause was not drawn in such a manner as to be in the alternative, so that if no Recorded Map existed, then another phrase of the clause under inspection would become operative, as we have shown was the fact in the instant case.

V.

The Real Controversy Here, Is Between Two Sureties,—Not Between a Surety and an Insured. Therefore Rules of Construction Often Applied in Favor of an Insured and Against an Insurer, Do Not Apply, but Should the Court Disagree With Us, Then the Rules Should Be Applied Not Only Against Lloyd's, but With Equal Force Against U. S. F. & G.

Finally, we take the liberty of anticipating the possible contention by U. S. F. & G., that being a fidelity bond, and Lloyd's Bond having been drawn by itself, and a premium charged therefor, the Court should construe all of its provisions most strongly against it, and in favor of the plaintiff, Fruit Growers.

The rules for construction of bonds, as is so well known, has been stated in varying ways, some cases indicating that there should be a strict construction placed upon such bonds, and that the Court should not enlarge the contract by construction. Others state that there should be a liberal construction against sureties who have written bonds for a consideration, and others state that bonds are contracts, like other contracts, and that the rules of construction apply the same in such cases, as they do in the cases of other contracts.

We feel that it is wholly immaterial what one of these rules of construction the Court desires to follow, for the very simple and obvious reason that the Court is not here concerned with the construction only of Lloyd's Bond, but it is here concerned with the construction of a number of documents as a whole, which of course includes the

bonds written by U. S. F. & G. Therefore, if the rule of liberal construction is to be applied as against Lloyd's, it must also be applied against U. S. F. & G. The weight must fall equally upon both of these sureties. It would not comport with the most fundamental principles of justice, to single out Lloyd's Bond and attempt to apply the rule against it, and either disregard U. S. F. & G.'s Bond or apply a different rule in relation to that surety.

Certainly, as we have shown, the application of a rule of liberal construction to both of them would weigh far more strongly against U. S. F. & G., by reason of the execution by them of their Superseded Suretyship Riders, than it would against Lloyd's, but aside from all this, we submit that the rule of construction which requires an interpretation most strongly against the one who used the language, has no application whatsoever in the instant case. No rule ordinarily favorable to an assured under a policy, can justly apply herein, since the real controversy is not between the assured and the insurer, either as to U. S. F. & G. or Lloyd's. The real—the basic—the fundamental, and the obvious controversy, is between two sureties,—that is, between Lloyd's and U. S. F. & G., and neither reason nor decision would support the application of the rules which apply only when there is a real controversy between the assured and the insurer.

This rule, which we believe will appear obvious, has been announced in the case of *"The Grecian"*, 78 Fed. (2d) 657, 662, wherein the Court said:

> "Neither does the rule of strict construction against one who chose the language used, aid the appellant, although it seeks to invoke it on the theory that the

carriage contract was ambiguous in respect to assumption of liability for sea perils. It was not a party to the contract, so without the scope of the rule. National Fire Ins. Co. v. Maddox, 224 Mo. App. 90, 20 S. W. (2d) 705, 707."

Conclusion.

In conclusion we respectfully submit:

(1) That there is presented here a pure and unadulterated question of law;

(2) That any other construction than contended for herein, would lead to the absurd result of attributing to U. S. F. & G. the performance of a useless and meaningless act, in the execution of the Superseded Suretyship Rider, and the acceptance by them of a consideration for a worthless piece of paper;

(3) That the contemporaneous construction placed upon Lloyd's Bond by Fruit Growers and U. S. F. & G., was exactly the same as that placed thereon by Lloyd's, and as contended for herein;

(4) That Lloyd's Bond is clear, definite and unambiguous, and that there is therefore no room for construction;

(5) That to hold that Lloyd's was liable for losses discovered within three years after its bond expired, would require the Court not to construe the contract, but to rewrite and insert that which had been omitted.

Respectfully submitted,

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